

10508 PROCEDURES TO FOLLOW UPON ISSUANCE OF COMPLAINT

administrative law judge's decision are necessary, exceptions to the administrative law judge's decision should be filed. Section 102.46 of the Board's Rules and Regulations.

10506.8 Following a Board Order

The Compliance Officer should initiate compliance action with the remedial provisions of the Board's order as soon as it issues. Section 10596. Where the Region determines that corrections to the Board order are necessary, a motion for reconsideration of the Board's decision and order should be filed. Sections 102.48 and 102.49 of the Board's Rules and Regulations.

10506.9 Following Entry of a Court Judgment

The Compliance Officer should begin compliance efforts immediately on entry of the judgment. If the court only partially enforces the Board order, compliance should ordinarily be sought immediately with respect to the portions enforced. Section 10632.

If the respondent seeks certiorari, compliance efforts should only be deferred where a court has issued a stay of the Mandate and/or when certiorari is granted.² A respondent that refuses to comply is subject to contempt proceedings when a stay has not been sought or has been denied. Sections 10616 and 10632 set forth procedures for initiating contempt proceedings.

When stay of Mandate has been issued by the court of appeals, Division of Operations-Management clearance should be sought before demanding compliance action.

10506.10 Compliance Procedures While Appeals, Exceptions, and Motions for Reconsideration are Pending

Compliance efforts should not be undertaken during the appeal period of a unilateral settlement agreement, when the Region or charging party is filing exceptions to an unfavorable decision of an administrative law judge, or while a motion for reconsideration of a Board order is pending, without advising the respondent that the final ruling may cause compliance requirements to be altered.

10506.11 Following Dismissal of Unfair Labor Practice Proceedings

Compliance proceedings are initiated only to effectuate remedies based on findings of violations of the Act. Thus, whenever an unfair labor practice proceeding leads to dismissal of allegations of unlawful conduct, all compliance actions should cease.

10508 Procedures to Follow Upon Issuance of Complaint

10508.1 Upon the Region's Determination of a Violation or Issuance of a Complaint

When the Region determines that a violation has occurred, appropriate remedial measures must also be formulated, both to facilitate immediate settlement discussions and in anticipation of eventual compliance proceedings.

² *McCurry v. Allen*, 688 F.2d 581, 586 (8th Cir. 1982), citing *Stern & Gressman*, Supreme Court Practice, at 847 (5th Ed. 1978).

10508.2 Review of the Complaint for Compliance Issues

Upon issuance, all complaints should be reviewed to ensure that:

- **Proper Form of Business:** The proper form of business organization is stated in the caption. Businesses generally are organized as proprietorships, partnerships or corporations. Labor organizations technically are unincorporated associations, but for purposes of liability are generally treated as corporations. A cardinal principle of corporate law is the concept of “limited liability,” under which shareholders are not liable for the debts of the corporation. In the case of a proprietorship or partnership, however, the proprietor or the partners are legally indistinguishable from the business entity; accordingly, the business’ remedial obligations, including the obligation to pay backpay, may be imposed on the proprietor or partners directly, without resort to principles of derivative liability. It is important that the Region properly identify the respondent’s business form. If the business is a sole proprietorship, the complaint should name the individual proprietor as respondent doing business as (d/b/a) xyz company; if it is a partnership, the complaint should name the partners and the partnership. The Region should utilize the Agency’s database search service, such as AutoTrak, and contact Secretary of State offices by telephone or via the internet to verify the proper business designation.
- Other potentially derivatively liable parties: Other persons (as defined by Sec. 2(1) of the Act) may stand in such a relation to the person committing the unfair labor practice that they too may be held responsible for remedying the violation—that is, they may be “derivatively liable.” Various theories of derivative liability are applied under the Act:
 - (1) A nominally distinct entity may be liable as an alter ego or disguised continuance of the person committing the unfair labor practice;
 - (2) The person committing the unfair labor practice may be part of an affiliated group of business entities that constitute a single employer for the purposes of the Act. A finding of single employer will permit the imposition of certain remedial obligations on the affiliates, including liability for backpay;
 - (3) Where the respondent’s operations are the subject of a bona fide transfer to new ownership and the business continues in substantially unchanged form, certain remedial obligations may be imposed on the acquiring entity as a *Golden State* successor, if it can be shown that the transferee acquired the business with knowledge of unremedied unfair labor practices;
 - (4) In cases involving a corporate respondent, the Board and the courts will in appropriate circumstances “pierce the corporate veil” and hold corporate shareholders derivatively liable for unfair labor practices. Generally speaking, the corporate fiction will be disregarded if its observance would produce injustice or inequitable consequences—for

example, where the corporate device is used to perpetrate fraud or evade statutory obligations, or where the corporate principals have intermingled their personal and corporate assets and affairs to the detriment of creditors, or have used the corporation as a mere “shell” to advance their own purely personal rather than corporate ends;³

- (5) A corollary of the doctrine of piercing the corporate veil is the direct participation theory of intercorporate liability, which holds that “when a parent corporation disregards the separate legal personality of its subsidiary (and the subsidiary’s own decisionmaking ‘paraphernalia’) and exercises direct control over a specific transaction, derivative liability for the subsidiary’s unfair labor practices will be imposed on the parent;⁴
- (6) Rule 65(d). The language of Board orders binding “officers, agents, successors, and assigns” is understood to be coextensive with the reach of Fed.R.Civ.P. 65(d), which provides that injunctions are binding on “the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order.” Thus, for example, corporate or union officers who fail to cause a corporation or union under their control to comply with a judgment liquidating specific amounts of backpay or other indebtedness are prima facie liable in contempt, and may be held personally liable at least to the extent that the corporation was capable of paying. Similarly, an owner/officer who, following entry of a court-enforced unliquidated make-whole order, takes steps to make it difficult or impossible for the corporation to comply may be held individually liable. In addition, a third party such as a customer or supplier may be held liable as a “person in active concert or participation” if it, with knowledge of the judgment, shifted its business dealings from the named respondent to an alter ego; and
- (7) Fraudulent transfers. If a named respondent gratuitously transfers an asset during the pendency or in anticipation of litigation, the transfer may be fraudulent under the version of the Uniform Fraudulent Transfer Act applicable in the state where the violation occurred, the state’s common law, and/or the fraudulent transfer provisions of the Federal Debt Collection Procedures Act, 28 U.S.C. Sec. 3304. If so, the person or entity to whom the asset was transferred can be named as a respondent, and a return of the asset (or its dollar equivalent) sought as a remedy. Under these circumstances, whether such a transfer can be set aside typically depends on such factors as when the transfer was made, to whom it was made (particularly transfers to “insiders” or members of their families), whether the debtor received adequate consideration for

³ *White Oak Coal Co.*, 318 NLRB 732 (1995). *Greater Kansas City Roofing*, 305 NLRB 720 (1991). See also *A. J. Mechanical, Inc.*, 345 NLRB No. 22 (2005).

⁴ *American Electric Power Co.*, 302 NLRB 1021, 1023 (1991), *enfd. mem.* 976 F.2d 1025 (4th Cir. 1992).

the transfer, and whether the debtor knew or should have known that its assets would be insufficient to satisfy a potential future debt.

10508.3 Resolving Remedial Issues in the Original Unfair Labor Practice Proceedings

In the following situations, when consolidation will facilitate full resolution of a dispute, the Regional Director may consolidate compliance proceedings with underlying unfair labor practice proceedings (see Sec. 102.54(b) of the Board's Rules and Regulations):

- Where the backpay periods are of relatively short duration and have ended before the unfair labor practice hearing begins, for example, where discriminatees have been reinstated or their backpay periods would have ended due to layoff or cessation of business.
- Where alter ego/derivative liability/successor or corporate veil piercing issues have arisen.
- Where backpay or other compliance issues are relatively simple and their consolidation would not confuse, impede, or unduly prolong the hearing.
- Where the respondent is likely to default, or has defaulted, with respect to the unfair labor practice complaint, and the case will be adjudicated in a summary manner.

In the above situations, a compliance specification should be prepared and served on the respondent in addition to the complaint. Novel or complex issues should be submitted to the Division of Operations-Management for clearance.

10508.4 Monitoring Respondent's Ability to Comply

At all times in the course of unfair labor practice proceedings, the Region is responsible for continually monitoring and assessing the respondent's current and prospective ability to comply with anticipated remedies. The Region should be alert to any evidence of actions by a respondent to impair its assets, to cease doing business, to sell or transfer its operations or assets, or to otherwise render itself unable to comply with the remedial provisions of the Board order. The Region should also look for developments that suggest that a respondent party will not be able to comply, such as a closing of operations, filing for bankruptcy, setting up a new or companion business, or selling of the business. Such issues may be raised by the charging party or discriminatees, or by the respondent when asserting inability to pay, or may come to the Region's attention through other sources such as news reports. Such issues should be promptly and thoroughly investigated, including contacting the respondent and other persons likely to have relevant evidence and, where appropriate, recommending that the Agency seek protective relief. In this regard, Regions should send a standard letter to charging parties and discriminatees, once a complaint issues, asking them to be alert for developments which may indicate that the respondent may avoid or frustrate compliance, and to let the Region know of such developments promptly.

The investigation may be triggered by actions such as the following:

- claim of inability to pay or to comply raised by any party,
- closure of business or substantial part (e.g., layoff),
- sale or potential sale of all or part of business,
- potential or actual loss of significant portion of customer base (e.g., completion of a major contract),
- apparent loss of assets,
- lack of cooperation by the respondent in providing evidence of its ability to comply, or supporting its inability to comply, or
- bankruptcy.

Such actions by the respondent, which may occur at any stage of the processing of the case, raise policy, legal and factual issues warranting a determination concerning how best to proceed against the respondent to preserve the availability of backpay and other remedies and prevent substantial noncompliance at the current or later stage of the case. See Sections 10672 through 10686, inclusive, regarding injunctive relief, protective restraining orders, notice to third parties with potential derivative liability and recording of judgments. For example, a protective restraining order under Section 10(e) or (j) may be appropriate, additional investigation to locate assets may be warranted and/or security agreements may be necessary, in the face of respondent's lack of cooperation.

The Region may consult with the Contempt Litigation & Compliance Branch at anytime concerning methods of investigating assets or the various protective measures available at a particular stage of the case. The Region need not await the issuance of a court judgment before contacting Contempt, as immediate preventive measures may be required prior to completion of the various steps of litigation. Note, however, that many normal actions to collect, protect, or seize assets may not be appropriate in bankruptcy cases. See Section 10670 regarding bankruptcy. Regions should consult with Contempt or the Special Litigation Branch regarding bankruptcy matters.

On assignment of a case to compliance, the Compliance Officer should immediately assess the respondent's ability to comply. Thus, when the respondent does not respond to communications regarding compliance or when the respondent's ability to comply is not obvious or cannot be verified, the Region should investigate the matter and should make a determination about the respondent's continued ability to comply. Such investigations and determinations should not await the issuance of a court judgment. The charging party and discriminatees should be advised to notify the Compliance Officer immediately of any significant change in the respondent's financial condition, operations or identity.

10508.5 Investigative Methods

The Compliance Officer should review relevant records, including but not limited to the ones described below, in order to investigate an assertion of inability to pay. Such records should be sought from respondent or from other sources identified below.

- recent financial statements prepared by an outside certified public account or bookkeeping firm,

- internal financial reports, ledgers, and other records of income and expenses,
- tax returns from recent years,
- bank records, including statements, canceled checks, records of deposits, loan applications and credit files,
- public filings, such as articles of incorporation and business licenses,
- records of real property holdings and other assets, such as vehicles, or
- documentation of liens, adverse judgments, and other liabilities.

In addition to providing records and documents, respondent's representatives should complete a financial questionnaire provided by the Region which requires full statements and explanations of the respondent's financial condition. See Appendix 2. If necessary, respondents may be compelled to provide required documents and testimony (including completion of the financial questionnaire) through the use of Section 11 investigative subpoenas.

10508.6 Investigative Resources

Even when the respondent is fully cooperative in the investigation, corroboration from outside sources of its records and statements is generally appropriate. In cases where the respondent is not cooperative or where its assertions appear questionable, outside sources of information may be critical to the investigation. Among such sources to consider are the following:

- Employees can provide information about current levels of work, current orders being shipped, customers, and other material issues.
- Unions can provide information, gained from representational activities, concerning industry conditions.
- Customers, suppliers, landlords, tenants, utilities and common carriers may provide information about levels of business activity and performance.
- Outside bookkeepers, accountants, and tax preparers may be valuable sources of information regarding a respondent's financial condition and activities.
- Other creditors, including parties to lawsuits, may provide information concerning other respondent liabilities.
- On-line Sources. Database search programs (AutoTrak) are provided to the Agency on a flat fee basis and contain extensive public and private records. These should be utilized to determine accurate name of respondent and related entities, corporate affiliates of respondent, and location of witnesses and assets. Regions may contact the Contempt Litigation & Compliance Branch for assistance in conducting such on-line searches.

Public Sources of Information: Public sources of financial information include Federal agencies, such as the Securities and Exchange Commission, for corporate data in publicly held corporations; the Department of Transportation, for licensing and background information on financing and ownership for commercial interstate carriers;

the Small Business Administration, for officers, stockholders, and purpose of the SBA assistance; the Internal Revenue Service, for records of seizure and sale of real estate and information regarding tax-exempt organizations; the Postal Service, for new or redirected addresses, location of address, or name and address of business post office box holder; and the Department of Labor, for disclosure of reports concerning labor organizations.

Information available depends on the respective agency's disclosure policy and requests may be directed to the disclosure officer of the respective agency.

The National Directory of State Agencies, N. Wright & G. Allen, a standard reference available in most public libraries, provides names, addresses, and telephone numbers of state regulatory bodies, by function, for all 50 states. Useful state agencies include the Department of Motor Vehicles for ownership and liens registered in the state; the Secretary of State for records of corporations doing business or incorporated in the state, as well as Uniform Commercial Code Records disclosing transactions involving collateral; the Department of Labor for workers compensation and unemployment reports; the Department of Internal Revenue or taxation for tax filings; and licensing agencies for businesses such as health care institutions or entities engaged in sales of alcoholic beverages.

Local city or county Governments maintain records for tax assessments, such as for real estate and personal property, and records concerning business licenses, alias filings, and building permits that may reveal the identity of owners or contractors. Public utilities provide the name and billing address of individuals or the business entity occupying the premises and may retain copies of payment checks which show respondent's bank and account number.

Commercial Sources of Financial Information Available Through the Agency: Dun and Bradstreet reports provide a range of information on ownership and activity of businesses, including names, addresses and backgrounds of owners, recent levels of business activity, recent payment history and outstanding liens and judgments. Regions should feel free to consult with Contempt Litigation & Compliance Branch regarding the range of available information or to discuss a particular situation.

The Agency has a subscription to Dun and Bradstreet; Regions may request reports on individuals or firms by submitting requests to the Agency's Library Section. The request should contain all known names and addresses of the entities on which information is requested. Because of cost, Regions should not request information from Dun and Bradstreet directly. If there is need for expedited information, the Region may e-mail, fax, or telephone the Library Section.

General References: The following publications provide general estimates of company assets: Dun & Bradstreet Reference Book (financial strength); Thomas Register of American Manufacturers (tangible minimum assets of manufacturers); Standard & Poor's Corporate Records (total tangible assets); Moody's Industrials (describes form of assets for companies listed on a stock exchange); and Value Line (specific information). Regions should contact their local libraries to obtain copies of these publications.

Search or Tracing Services: Search or tracing services are available on a contract basis to undertake specific search or research efforts. Regions should contact the Division of Operations-Management in the event search or tracing services are needed.

Accounting Assistance: In some situations, such as when the amount of backpay is large, or the respondent's finances are complex, the Region may conclude that it is appropriate to have the respondent's financial records, contentions, and proposals regarding backpay reviewed by a certified public account. Accountant assistance may also be available from the Finance Branch or obtained through the assistance of the Contempt Litigation & Compliance Branch. If the Region believes that the review should be performed by an outside accountant, it should request approval from the Division of Operations-Management, which will ensure that applicable procurement regulations are observed in contracting for this service.

10508.7 Investigative Subpoenas

When necessary documentary or testimonial evidence relating to a compliance investigation cannot be obtained voluntarily, Regions are encouraged to utilize Section 11 investigative subpoenas and/or U.S. District Court subpoenas (pursuant to Rule 69 of the Federal Rules of Civil Procedure, where a money judgment has been registered) to obtain the necessary information.

Regions are authorized to issue investigative subpoenas duces tecum for the production of documents or other materials from any party or witness and investigative subpoenas ad testificandum to compel testimony from witnesses to secure evidence not conveniently available from other sources when foreseeable barriers to enforceability are not present. If there are questions about the propriety or enforceability of a subpoena, the Division of Operations-Management should be consulted. Section 10618.1 provides a more comprehensive treatment of this subject, including examples of general legal precedent supporting the Board's broad subpoena authority of an administrative agency.

Bank Records and Investigative Subpoenas: Bank records of the respondent or other relevant entities may provide a fruitful source of information during a compliance investigation. Regions should consider the use of investigative subpoenas to obtain such records, keeping in mind that under the Right to Financial Privacy Act of 1978 (FRPA) (12 U.S.C. Sec. 3401, et seq.), unless certain exceptions apply, the Agency, as an instrument of the Federal Government, may not issue administrative subpoenas to banks or other financial institutions to obtain financial records regarding an individual or partnership of five or fewer persons, without first complying with certain preissuance notification procedures. (Note: the FRPA does not apply if the records of a corporation are being sought from a financial institution, if the records are being sought from someone other than a bank or other financial institution (for example, the respondent or an accountant), or if a district court (as opposed to a Section 11) subpoena is utilized.)

See Sections 10618.1 and 10686 for more information about the Right to Financial Privacy Act. This Act also contains provisions permitting delayed notification under certain conditions. Regions are encouraged to contact the Contempt Litigation & Compliance Branch for information and assistance regarding any matters involving the Right to Financial Privacy Act. In post judgment situations, Regions should consult with

Contempt before issuing subpoenas for bank or other financial records of entities covered by the Right to Financial Privacy Act.

When the Right to Financial Privacy Act applies, in addition to providing the customer with prior notification of the Agency's intention to issue the subpoena, Regions must serve the bank or other financial institution whose records are sought with both a copy of the subpoena and with a notice advising the bank or other financial institution of its right to object to the production of records and the procedures for making such objections. See Appendix 3 for samples to be used for this purpose.

The Region must wait 10 days after actual service, or 14 days after service by mail, before it is then entitled to production of the subpoenaed records, unless the customer(s) whose records are being subpoenaed has, in the interim, filed a motion to quash in Federal district court. See Appendix 4 for a certificate of compliance form to be sent to the bank or other financial institution after the required waiting period, assuming that no motion to quash has been filed.

In the event that the customer files a motion to quash, Regions can anticipate that the district court will order that a sworn response be filed (see 12 U.S.C. Sec. 3410(b)). Regions should consult with Contempt Litigation & Compliance Branch and the Division of Operations-Management for advice with respect to this response.

10508.8 Establish and Maintain Contact with Discriminatees

The discriminatee is the fundamental source of information regarding interim earnings and adjustments to gross backpay needed to determine net backpay. It is of utmost importance that contact be maintained with discriminatees throughout the course of unfair labor practice proceedings.

The Compliance Officer should establish contact with discriminatees as soon as possible after the Region has determined that a violation has occurred that might result in a make-whole remedy, both to begin collecting information needed to determine backpay and to advise the discriminatee of his or her responsibilities.

Early determination of net backpay obligations supports early settlement efforts. Even in cases that do not settle, later compliance proceedings are facilitated when discriminatees have been advised at the outset to maintain contact with the Region, of their responsibility to seek interim employment, and to maintain records of their efforts to obtain interim employment and of their earnings from interim employment.

To maintain contact and to provide appropriate information, the following NLRB forms, which are available on the intranet, should be sent to all identified discriminatees at the time the Region determines that a charge has merit and, if possible, no later than at the time it issues complaint:

NLRB-916	Backpay Claimant Identification
SSA 581	Authorization to Social Security Administration to Furnish Employment and Earnings Information
NLRB-4288	Information on Backpay for Employees
NLRB-4685	Notification of Change of Address

NLRB-5224 Claimant Expense and Search for Work Report

10508.9 Calculate Backpay With Information Collected From Discriminatees

Since the decision whether to comply with a Board order often turns on the cost of doing so, the Region should provide respondents with estimates of backpay liability where doing so is likely to bring about an early resolution of the dispute. Sections 10540–10566.

10512 Determining Compliance Requirements

10512.1 Overview

Once the case is assigned to Compliance, the Region should analyze compliance requirements of the case, advise the parties of those requirements, and establish what actions the respondent must undertake to fulfill them. Compliance processing begins with analysis of the actions required by the remedial provisions of settlement agreements and Board orders. Every Board order in which a violation of the Act is found contains remedial provisions. Orders almost always contain negative provisions, requiring the respondent to cease and desist from the actions that were found unlawful. Orders often contain affirmative provisions also, requiring the respondent to undertake specific actions, either to remedy losses resulting from its unlawful action or to restore conditions to those that existed prior to its unlawful actions.

Informal settlement agreements always contain remedial provisions as well, devised to be consistent with Board orders that have been based on the same or similar circumstances and violations.

In many cases, remedial provisions will be self-explanatory and requirements for their effectuation clear and not subject to dispute. In other cases, requirements will be less clear or disputed by the parties. In these cases, it is the responsibility of the Compliance Officer to investigate the facts and circumstances of the case and to apply appropriate policies and Board precedent in order to achieve compliance or to recommend further action by the Region.

To investigate remedial requirements, the Compliance Officer should begin by becoming familiar with the facts of the case to date, including the results of the Region's administrative investigation and the administrative law judge's decision or Board order. The Compliance Officer will then have to discuss requirements with all parties, advising them of compliance procedures and requirements, eliciting their positions on compliance issues that might be in dispute, and obtaining information needed to settle or determine disputed issues.

The following sections provide guidance for the investigation of a range of compliance issues, as well as case authority and current policies to assist in their substantive determination. Guidance on procedures to follow upon issuance of administrative law judge's decisions can be found in Section 10506.7, upon issuance of Board orders at Sections 10596–10612, and upon issuance of court judgments at Sections 10614–10644.